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SENTENCING AS CRAFTWORK AND THE BINARY EPISTEMOLOGIES OF THE DISCRETIONARY DECISION PROCESS

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ABSTRACT

This article contends that it is time to take a critical look at a series of binary categories which have dominated the scholarly and reform epistemologies of the sentencing decision process. These binaries are: rules versus discretion; reason versus emotion; offence versus offender; normative principles versus incoherence; aggravating versus mitigating factors; and aggregate/tariff consistency versus individualized sentencing. These binaries underpin both the 'legal-rational' tradition (by which I mean a view of discretion as inherently suspect, a preference for the use of philosophy of punishment justifications and an explanation of the decision process through factors or variables), and also the more recent rise of the 'new penology'. Both approaches tend to rely on 'top-down' assumptions of change, which pay limited attention to the agency of penal workers. The article seeks to develop a conception of sentencing craftwork as a social and interpretive process.¹ In so doing, it applies and develops a number of Kritzer's observations (in this issue) about craftwork to sentencing. These craftwork observations are: problem solving (applied to the rules–discretion and reason–emotion dichotomies); skills and techniques (normative penal principles and the use of cognitive analytical assumptions); consistency (tariff versus individualized sentencing); clientele (applied to account giving and the reality of decision making versus expression). By conceiving of sentencing as craftwork, the binary epistemologies of the sentencing decision process, which have dominated (and limited) the scholarly and policy sentencing imaginations, are revealed as dynamic, contingent, and synergistic. However, this is not to say that such binaries are no more than empty rhetoric concealing the reality of the decision process. Rather, these binaries serve as crucial legitimating reference points in the vocabulary of sentencing account giving.

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INTRODUCTION

THE PURPOSE of this article is to reveal that scholarship about the sentencing decision process (and indeed judicial decision making more generally) is dominated by a series of taken-for-granted epistemic binaries. The article exposes these binaries which are found in legal-rational scholarship *and* in critiques of that scholarship (or consequences of it) in 'the new penology' (Feeley and Simon, 1992, 1994). Legal-rational perspectives argue that the sentencing decision process lacks: 'coherence' (e.g. Lovegrove, 1989; Albrecht, 1994; Henham, 1998) structure, rationality, predictability, clarity and certainty, and principled justification, and that it is in need of juridification. Perspectives inspired by the new penology which are concerned with analysis of 'late modernity' (Garland, 2001) and often (implicitly) critical of the legal-rational tradition suggest that sentencing is becoming dominated by risk-based conceptions of crime control. Furthermore, perspectives inspired by the new penology suggest that punishment is increasingly concerned with decision making driven by risk technologies (rather than substantive individualized judgment), categories and groups (rather than individuals) and the calculation of risk (e.g. Feeley and Simon, 1992, 1994; Ericson and Haggerty, 1997; Franko Aas, 2005). These new penology perspectives detect an insidious shift in power away from the ability of judges (who, it is said, are being deskilled) to make substantive judgments and towards techno-rational managers concerned with the distribution and allocation of risk.

The concerns of both the legal-rational tradition and the new penology resonate with the ancient question (e.g. Nussbaum, 1986; Davis, 2002) of whether judging is best *empirically* described as an art (as tends to be depicted by the legal-rational tradition), or, becoming a (pseudo)science (as tends to be depicted by the new penology). Seen from this art/science perspective, these two traditions seem to be mutually contradictory opposites. Yet there may be more commonality than first meets the eye. Both the legal-rational tradition and the new penology share much of the same binary thinking about sentencing, including: rules versus discretion; reason versus emotion; rational deduction versus intuition; consistency versus individualization; offence versus offender factors; aggravating versus mitigating factors; the reality of decision making versus its rhetorical expression.

Moreover, both the legal-rational tradition and the new penology tend to be inspired by evidence from official policy discourses. Legal-rational scholarship tends to comprehend sentencing through an analysis of reported judgments, and government discourse whereas new penology tends to concentrate on official policy changes, media reporting and public discourse. While both provide vital evidence of official and public discourses, neither approach

concentrates much on the practices of actors on the ground. For example, in any given jurisdiction, to what extent (if at all) and in what ways do the judgments of the Court of Criminal Appeal really alter the daily work of first-instance sentencers? Do changes in the climate (as seen in the discourse of senior officials, politicians, etc.) affect the work of penal workers and if so, how? How do apparently major shifts from one normative principle to another (e.g. welfare to risk) play out on the ground? Both legal-rational and new penology traditions tend implicitly to assume a relatively 'top-down' approach to policy change. How quickly or completely that change is expected to occur cannot easily be specified, but nonetheless it is assumed that it *must* have that effect.² It is a question of 'when' not 'whether'. In this sense, it is a hierarchical and determinist view of the processes of transformation.

There is, of course, another school of thought on the process of the implementation of policy change which emphasizes that 'street-level' (Lipsky, 1980) decision makers, in effect, make policy because they face various choices as to how they implement it. This emphasizes not only that street-level actors may or may not resist policy, but may do so consciously, subconsciously or mix of these; may interpret it in different ways; comply or not; or, may create ways of complying with the spirit rather than the letter of the law (e.g. McBarnet and Whelan, 1997).

Thus by paying more serious attention to sentencing processes at street level (as well as being aware of official and public discourses), it becomes possible to explore the conception of sentencing as a craft. A conception of sentencing as craftwork destabilizes long-assumed binaries in sentencing. In so doing, these binaries can be recognized as dynamic rather than static, fundamentally contingent rather than universal, and synergistic rather than discrete and oppositional. By conceiving of sentencing as craftwork these binaries are revealed as fluid, mutable, and, protean. Sentencing as craftwork allows us to conceive of the judicial decision process as about *both*: choice *and* order; implicit routine *and* explicit normative principle; analysis *and* intuition; individualization *and* consistency; rationality *and* emotion; mind *and* body. These qualities co-exist dynamically, are synergistic, and inhabit each other.

These binaries are brought into focus by consideration of sentencing as a craft. By drawing on the work of Howard Becker (1978), in his article in this edition of this journal Herbert Kritzer outlines the dimensions of craftwork and how these might be applied to judging. Here, I seek to consider, adapt and develop a number of Kritzer's observations on: problem solving, skills and techniques, consistency, and clientele satisfaction. We will examine each of these in turn.

PROBLEM SOLVING IN JUDGECRAFT

Much judicial work is boring to judges. Cowan and Hitchings (this issue) for example, point out that despite the 'dramatic consequences' for possession

proceedings against an occupier of social housing, courts treat the proceedings as 'usual, mundane, ordinary, commonplace, even dull'. So too the criminal process and sentencing in particular. Research has observed that judges (like other professionals) regard most of the cases which appear before them with a weary insouciance (e.g. Carlen, 1976; McBarnet, 1981; Tata et al., 2006). The criminal process normalizes and standardizes individual circumstances and thus renders the unfamiliar familiar and repetitious. In other words, the process of converting individuals and circumstances to cases means that they are *made* boring by and to those who process them.

The fact that sentencing judges tend to regard most sentencing work as largely repetitious and dull is significant for several reasons.³ Here, however, I wish to concentrate on the relationship between rules and discretion in judge craftwork. Kritzer (this issue) suggests that

while craftwork is often repetitious, it also regularly involves unanticipated problem solving. Something does not work as expected or something goes wrong, and the craftsperson has to make adjustments on the fly . . . The craftsperson needs to be able to improvise in ways that both serve the ultimate goal and which draw upon the craftsperson's skill and experience.

How might this be applied to sentencing? One might suggest, as Kritzer appears to do, that a departure from the routine 'when something does not work as expected' would be an unusual case where the judge has to make adjustments from routine and exercise his/her discretion (individualized justice). This view supposes that discretion is necessitated by the occasional aberrant case which deviates from the rule and where the decision maker 'has to improvise' in order to reach 'the ultimate goal' of justice. However, this view of rules and discretion relies on what I refer to as a 'juridical paradigm' which counterposes rules and discretion as opposites; an assumption which is undermined by a conception of judging as craftwork.

THE JURIDICAL PARADIGM: RULES VERSUS DISCRETION

The dichotomy between discretion and rules is apparent in both the traditions of legal-rational scholarship and the 'new penology'. Both traditions rely on an understanding of discretion based on a 'juridical paradigm', which privileges legal structure and principles (in the case of legal-rational tradition) or risk-based rules (in the case of the new penology) over daily social practices.

The juridical paradigm understands the judgment process in sentencing in one of two basic and competing ways: discretionary *or* ordered by rules. According to this division, sentencing is *either* informal and thus essentially lacking in structure, arbitrary and capricious, *or* it is governed by legal rules, principles and policies. I seek to suggest that sentencing is ordered, and predictable, but not by rules and policies alone. The legal-rational tradition has been concerned with the need to tame, confine, and structure discretion by recourse to rules. The new penology has also portrayed discretion and

rules as in mutual opposition: more rules means less discretion and a move from discretionary individualized justice to actuarial justice based on categories of risk.

This prevailing juridical view (on which both the legal-rational tradition and the new penology rely) has been that if sentencing lacks legal rules, then it must be discretionary and unpatterned. If it is not, then decisions are presumed to be the product of individual judicial whims and fancy (as portrayed by the legal-rational tradition) or individualized welfare justice (as characterized by the new penology). The notion is that 'more discretion equals less order'. In this vision, law and official policy are seen as the obvious and primary instruments to govern human behaviour. The juridical paradigm regards legal rules as the main determinants of reason and order in decision making. This conception is neatly captured by Dworkin's (1977) celebrated doughnut analogy: 'Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction' (p. 31). In this analogy discretion does not exist unless law permits it to. Discretion is defined negatively: it is a void, a space. It is the reliance on this conception of discretion and rules, which leads legal-rational scholars to identify a 'gap' between what legality supposes ('the theory'/'law in the books') and the empirical reality of practice ('the practice'/'law in action'). This 'gap' is only a 'problem' if one expects that law is or should be the main governing source of discretionary behaviour and is only unexpected if it is assumed that law governs discretion. Indeed, there is only a 'gap' when viewed through the juridical lens, which counterposes rules and discretion.

In this regard, the main difference between the new penology and legal rationality is their normative evaluation of juridification. For legal-rationalists juridification of sentencing is a good thing, whereas for writers inspired by new penological concerns it is a bad thing: the erosion of discretion replaced with risk techniques has been portrayed implicitly or explicitly as a negative turn (O'Malley, 2004) and a move towards actuarial justice, calculability and uniformity. Legal discretion is valued because it is thought to resist both closure in decision making and the shift towards actuarial automation.

In this way, despite its intense concern with social history and penal transformation, there has been only limited application of new penological ideas to the daily routines of sentencing, and where this has been applied to sentencing (e.g. Franko Aas, 2005) it has tended to rely on a juridical and individualized view of the operation of discretion. Farnko Aas (2005: 15) defines discretion as 'the opposite of rules'. Rather than regarding legality as the starting point to understanding discretionary legal behaviour, a focus on judgecraft instead invites the possibility that rules and discretion are exercised *simultaneously* and may only be mutually distinguishable in the abstract. The indeterminacy of 'rules' and 'facts' as well as the shifting and dynamic application of one to the other (Bourdieu, 1987) means that, from a social-interpretive perspective, the scope of what is called 'discretion' and 'rules' is inescapably indeterminate in daily practice (even if an abstract analysis might suggest greater precision). In this way what, in the abstract,

we may term 'rules' and 'discretion' should not be counterposed as opposites. Rather 'rules' are inherently malleable, indeterminate and discretionary while 'discretion' is inherently patterned, ordered, and rule-governed (e.g. Baumgartner, 1992; Hawkins, 1992; Lacey, 1992). To put it in Dworkinian terms: the dough is always full of discretion and the holes are replete with codes, expectations and cultural-cum-organizational rules.⁴

An illustration of how the sharp distinction between rules and discretion made in the abstract collapses when studying daily craftwork is that discretionary decision makers tend to be able to decide the limits and scope of their discretion. Thus in any particular instance, discretionary actors may define their scope for discretion permissively and expansively *or* restrictively, even to the point of denying any discretion at all. A dramatic example of self-denial of discretion comes from Robert Cover's (1975) historical study of the Fugitive Slave Act: 'Time and again the judiciary paraded its helplessness before the law; lamented its harsh results yet nonetheless declined to use their legal discretion to make "ameliorist" solutions possible' (pp. 5–6). Other examples include the way in which judges restricted their own discretion in taking account of criminal convictions in their restrictive interpretation of Section 29 of the 1991 Criminal Justice Act in England and Wales (e.g. Brownlee, 1994); the way South African judges have denied themselves the very discretion which they claimed to cherish in relation to mandatory sentencing (van Zyl Smit, 2002); the way that prison officers focus on the enforcement of their authority rather than 'the rules' (Leibling and Price, 2003); and the way in which sentencing judges choose to deny their own discretion in passing short custodial sentences (Tata et al., 2006; Tombs and Jagger, 2006). Thus, in selectively denying or expanding the scope of 'rules' and 'discretion', judges *are* exercising discretion. In this way, 'rules' and 'discretion' are better understood as fluid, unstable and synergistic rather than as distinct entities locked in mutual opposition.

From this perspective it becomes implausible to talk of rules and discretion as opposite forces or distinct from one another, or, to talk of a 'balance' between rules and discretion, or, to suggest that more rules means less discretion or vice versa. In routine judgecraft, rules and discretion easily become mutually indistinct. What we call 'rules' and 'discretion' contribute to a reservoir of account-giving resources to be used as a legitimating justification for different courses of action. The juridical conception of rules versus discretion is supported by a reason–emotion binary.

REASON–EMOTION BINARY The neat distinction between law and discretion resonates with work on gender and law. Law is structuring, rational, man-made, actively constructed, deliberately logical, abstract, universal, principled, calculable and imposes itself. It is the subject. Discretion, on the other hand, is the object. It is understood as a residue of rules: a 'lack', a 'hole', 'void', mysterious, capricious, fickle, emotional and needing to be controlled and tamed by law. This is also reflective of fundamental enlightenment models of reason versus emotion. From a legal-rational perspective take

for example, Thomas's seminal 1963 essay advocating reason giving as a way of avoiding emotion:

If a judge is under an obligation to formulate and state the reasons for his decision, it will be necessary for him to arrive at a decision for which proper reasons can be given . . . The immediate effect of an obligatory statement of reasons [would remove] the danger of sentences based on an immediate emotional reaction to some feature of the offence. (Thomas, 1963: 246–7)

In a similar vein, but writing from a perspective inspired by new penological concerns, Franko Aas (2005) argues that the move towards the use of rational calculation in sentencing ignores the body (emotion, feeling and concern with the humanity of decision making) in favour of the mind (rationality, programmability). Thus, in both the legal-rational tradition and in the new penology, reason and emotion are counterposed and treated as mutually distinct entities. Yet the concept of craftwork suggests that decisions may not be made purely on the basis of 'reason' nor purely on the basis of 'emotion' but on a more subtle synthesis of the two (gut feeling, intuition, hunch, etc.). Moreover, the deployment of the display of emotions is critical to the public performance of sentencing craft: a subject to which we now turn.

THE MANAGEMENT OF THE DISPLAY OF EMOTION Given that it is seen as the opposite of reason, emotion is regarded by legal-rational scholarship as the enemy of objectivity, neutrality and impersonality of judging. However, the ability of judges not simply to suppress but to manage emotional displays is crucial to the criminal and sentencing process. First, it is used instrumentally to encourage desired outcomes, most particularly the closure of cases and getting through the list (Mack and Roach Anleu, this issue). Recent ethnographic research into the production and interpretation of pre-sentence reports in Scotland⁵ (Tata et al., 2006, forthcoming; Halliday et al., 2007a) highlights a central problem perceived by judges and other professionals engaged in the sentencing process: the pervasive potential of so-called 'innocent guilty pleas' (a term coined by Bottoms and McClean, 1976). An 'innocent guilty plea' is where the accused person who has formally pled guilty also denies (through their accounts to pre-sentence report writers and others) that they were truly guilty. For court professionals (especially judges, defence lawyers and pre-sentence report writers) this presents a serious problem both in terms of time and moral legitimacy, and it is crucial that convicted persons are managed and persuaded that they or their defence lawyer should present an account which avoids and suppresses any impression that it is incompatible with the formal guilty plea. In this situation, sentencing judges use displays of emotion to try both to influence the client directly and to influence the defence lawyer (Tata et al., 2006). While in represented cases this process takes place via the defence lawyer, in unrepresented cases 'magistrates can be instrumental in encouraging a defendant to feel remorse, guilt, shame, perhaps, relief or gratitude, and fear of the consequences of re-offending rather than anger, contempt or indignation' (Roach Anleu and Mack, 2005: 602–3).

However, the management of the display of emotion is not simply used by judges to hasten case processing. It can also be used to create delay and postponement. As well as expediting the closure of cases, sentencing judges may also seek to assuage their workload by encouraging 'judge shopping'. They may trade on (real or supposed) reputations and their (apparent) ability to sentence on the basis of emotion. For example, where a judge might feel that they have been given too many cases to get through, one possible strategy is to let it be known through court clerks that she or he is in a 'bad mood'. Court 'regulars' may get the 'joke' while the influence on accused persons can have the intended effect:

I think the sheriffs [i.e. judges] themselves kind of know [about their sentencing reputations]. I mean sheriffs know, they'll make jokes about it, you know . . . The other week, I know there was one of the sheriffs, it was late on, he had a whole batch of reports to read and he'd just been given the court . . . that morning because somebody else was off sick and, he phoned down to the clerk and said, 'I'll be down in ten minutes, tell them I'm in a really foul mood and everyone will get the jail this morning!' in the hope that half of them will run away! So, I mean, they sort of, they realise that that happens as well. (Defence solicitor interview, pre-sentence reports research, Tata et al., 2006: 21)

In this way, the management of the display of emotions may play an important role in the legitimisation and (thereby) expedition of criminal cases, and also by achieving delay. Emotion is managed and selectively displayed in deliberate, conscious ways which are calculated to achieve certain responses in others. From that perspective, emotion is deployed rationally. Thus, a simple demarcation between reason and emotion may not be sustainable (Mack and Roach Anleu, this issue). As with rules and discretion, the reason-emotion binary is mutable, contingent and synergistic.

We move now to look at another of the dimensions of craft advanced by Kritzer: skills and techniques.

SKILLS AND TECHNIQUES IN SENTENCING JUDGE-CRAFT

Kritzer (this issue) observes that while some parts of the skill and technique of craftworkers is "knowledge" which can be systematized and conveyed through written or verbal instruction . . . a significant amount of what the accomplished craftsperson does cannot readily be described by the craftsperson. She simply does it and does not think about it.'

Anyone who interviews judges about their decision making will have been frustrated by a similar inability of judges to explain clearly how they came to the judgment they did. Apprehending 'the' rationale for decision making has long been a focus of frustration among sentencing scholars, particularly in the legal-rational tradition, which is suspicious of intuition as a basis of adjudication. A particular concern of both the legal-rational tradition and the new penology is to explain the sentencing process by way of normative penal rationales.

THE NORMATIVE PENAL PRINCIPLES PARADIGM

The new penology has argued that the principle of risk is replacing substantive individual judgments: 'Actuarial risk has taken on hegemonic dominance that supersedes other models of governance, such as welfare and other disciplinary forms of regulation' (Maurutto and Hannah-Moffat, 2006: 438). Largely on the basis of analysis of official policy and public discourses, sentencing is said to have previously been more concerned with the making of substantive judgments on the basis of aims such as rehabilitation. This welfarist tradition is said to be ebbing away and being replaced by the quite distinct logic of risk calculation. However, recent close empirical research into the operational practices of 'risk' and 'welfare' suggests a more complex and fluid picture (e.g. Halliday et al., 2007a; Kemshall and Maguire, 2001; Maurutto and Hannah-Moffat, 2006).

PRINCIPLES VERSUS INCOHERENCE In the legal-rational tradition 'normative penal principles' have been understood as a variation on the familiar menu of: retribution and/or just deserts, incapacitation, general deterrence, individual deterrence, rehabilitation, denunciation, and so on. The legal-rational tradition has regarded sentencing scholarship and reform as lacking in principled 'coherence'. The opening mantra of most sentencing textbooks supposes that sentencing practice is ultimately driven by these competing rationales and that incoherence flows from dissensus in answer to the normative question, 'why punish?' Texts typically proceed to rehearse the standard menu of normative philosophical aims of punishment (variously also referred to as 'principles', 'rationales', 'theories', 'goals', 'purposes', etc.). Though there is some variation on the theme, the message is normally unequivocal: these principles or systems of thought are locked in a grand intellectual battle and it is this battle which is at the root of 'incoherence' in sentencing practice. Unless and until, it is said, we have consensus about which theory is best or at least which hybrid of the theories, underlying incoherence in sentencing will continue (e.g. Fox, 1994; Doob and Brodeur, 1995; Henham, 1996, 1997; Hutton, 1997).

Let us first examine the thinking behind the idea that routine sentencing work is best explained through the lens of normative principles. There has been very little attempt to test whether or not judges base their decision processes on penal principles. In other words, it has been largely taken for granted that the use of discretion is fundamentally determined by one or more of these specific principles. This proposition, which has become something of a truism in sentencing scholarship, is widely regarded to have been scientifically validated, most notably by the seminal work of John Hogarth.

In his pioneering and hugely influential study, *Sentencing as a Human Process*, Hogarth (1971) advanced the thesis that sentencing is determined largely by the penal philosophies of the individual sentencer. These normative principles are said to frame interpretively the information the individual receives so that the sentence which the sentencer passes is consistent with

his/her pre-existing penal philosophy and attitudes. The use of interpretive schema is indeed crucial. However, *Sentencing as a Human Process* leaps from finding that sentencers frame their judgments selectively to then assuming that what is behind this process of interpretation must be explained mainly in terms of individual philosophies.⁶

The second finding from *Sentencing as a Human Process* which merits re-examination concerns the assumption that the production of sentencing decisions is fundamentally an individual activity, albeit in the supplementary context of some social factors: 'While magistrates were inconsistent with each other, they were consistent within themselves' (Hogarth, 1971: 360).⁷ Yet *Sentencing as a Human Process* might be characterized as 'sentencing as an individual cognitive process'. It presupposed that sentencing is driven by individual philosophies and attitudes and ignored social and organizational influences. Likewise, two of the other most influential sentencing scholars of our time, (David Thomas and Andrew von Hirsch), although occupying very different policy camps, share a conception of sentencing as an individual intellectual struggle. Indeed, even scholars advancing a sociology of sentencing (e.g. Hutton, 2006) have been tempted to portray sentencing as an individual judicial exercise. However, sentencing is not a discrete activity performed by an individual judge working in isolation (Travers, 2006) but its agenda is moulded earlier in the criminal process (e.g. Shapland, 1987; Hawkins, 2003), shaped collaboratively with other professionals (e.g. Eisenstein and Jacob, 1991) and inextricably bound with guilt-producing processes (e.g. Mather, 1979; Nardulli et al., 1988; Tata et al., 2006). Thus, to talk about sentencing craftwork is not to talk only of the craft of judges but of other sentencing professionals (e.g. prosecutors, defence lawyers, pre-sentence report writers). From this perspective, we might query whether the term 'judgcraft' is the most appropriate way to describe sentencing craftwork. There is a danger that it may lead us to suppose that the craft of sentencing is performed by the judge alone.

Legal-rational scholarship has amply demonstrated that sentencers' use of normative penal principles is vague, bland, and contradictory. The normal conclusion is that this 'incoherence' is reflective of a deeper normative penal dissensus. However, conceiving of sentencing as craftwork leads us to consider the social production of sentencing accounts as a purposive and pragmatic enterprise, rather than as an individual intellectual exercise problem to be solved (this point is discussed later in the section on 'clientele').

Together with analysing sentencing according to penal principles, there has also been a fixation with the attempt to model decision making analytically through the use of case 'factors', to which we now turn.

COGNITIVE-ANALYTICAL MODELLING OF THE DECISION PROCESS

By 'cognitive-analytical modelling', I am referring to the approach to decision process research based on the assumption that the individual judge's cognitive processes determine decisions on the basis of personal-attitudinal and

case 'factors'. Like the juridical paradigm, the cognitive-analytical model looks to find sequential reasoning in judgment-making but is supplemented by the power of universal 'factors'. Both are attracted to logical and quasi-mathematical metaphors (Davis, 2002).

Cognitive-analytical modelling of the sentencing decision process tends in particular to portray cases (the 'input') as being composed of little more than the sum of their basic elements: aggravating and mitigating factors.

THE BINARY OF AGGRAVATING AND MITIGATING FACTORS While the legal literature is dominated by sentencing principles as the main analytic lens, the empirical research literature is dominated by the tacit assumption that case 'factors' can be extracted and analysed to discern the relative explanatory power of individual 'pieces' of information (e.g. Hogarth, 1971; Lovegrove, 1989; Spohn, 2002). Most research has consisted of

attempts, generally unsuccessful, to obtain greater predictive accuracy. The typical approach to sentencing research is create a dependent variable (e.g. sentence length) that is then regressed on select legal (e.g. offence type and seriousness, history of offending) and extralegal (e.g. sex, race, socio-economic status, plea bargaining) variables. (Mears, 1998: 670)

The idea of case factors which determine decision-making relies on two key assumptions (which are similar to the assumptions underlying the other binaries as static, discrete and universal). The first is that the sentencing decision process can be most meaningfully understood by reducing it to the supposedly essential and irreducible individual, component elements of each case, and case type. Second, the concept of 'factors' assumes that each case element (factor) enjoys its own discrete independent properties, and maintains its own power on the outcome of the case, universally.

Yet, what is a 'factor'? How is a 'factor' identified? The cognitive-analytical literature almost invariably assumes 'factors' as given or obvious. Typically, studies explain that x per cent of sentencing decisions are 'predicted' by y number of case factors. Most studies of sentencing are concerned with identifying *which* factors are most associated statistically with sentencing outcome. Rarely is any discussion devoted to *how* 'factors' are identified.

Cognitive-analytical work has tended simply to equate 'factors' with case 'facts'. So not only does factorial explanation ignore how 'facts' are identified or not, it also ignores their contingent, fluid, synergistic and constructed nature. Yet criminological and socio-legal research into the criminal process has now provided ample demonstration of the social construction of case facts. The meaning of facts is contingent on the ever-evolving nature of the case. However, the factorial approach must necessarily suppose that the sentencing meaning of factors remains immutable and constant from one case to the next and indeed during each case. Far from being discrete, immutable and irreducible elements, in the routine decision process 'factors' are inextricable and inseparable from the meaning of the constructed and reconstructed typified whole-case narrative (Tata, 1997).

Take the example of the employment position of an offender about to be sentenced. The same information may both aggravate the seriousness of one case and mitigate the seriousness of another. Being able to retain a job might mitigate against a custodial sentence, or, being jobless might evoke greater sympathy for an offender's personal predicament. The same information may be 'aggravating' and 'mitigating' in the same case (Shapland, 1987; Halliday et al., 2007a). Intoxication is another simple illustration. It can suggest that the offender did not really know what they were doing or acted out of character. On the other hand it might be understood to suggest a recklessness, lack of respect for others or selfishness. Attempts to identify lists of aggravating and mitigating factors as fixed and universal predictors are, therefore, bound to fail.

THE OFFENCE-OFFENDER BINARY Sentencing research and sentencing reforms have almost universally understood cases as basically composed of two parts: offence and the offender. Yet, while research repeatedly shows that seriousness of criminal record is (along with offence information) one of the two major influences on sentencing, just *how* criminal record plays a role in the sentencing decision process has received surprisingly little attention (Roberts, 1997). Again, and in common with offence information, the typical and assumed approach is to identify 'factors' and to observe their numerical/statistical association with sentence outcome, often on the presumption of a 'two-staged process' (the basis of all guideline grid systems), in which the judge first considers the seriousness of the offence and then judges the seriousness of criminal record.

Attempts to represent criminal history have not adequately captured judicial understandings of similarity. This is because criminal record is understood immediately and routinely by conferring meaning *both* on 'offence' and 'offender'. 'Offence' and 'offender' information may be notionally and legally distinct but interpretively they operate synergistically, constituting typified whole-case stories (Tata, 1997). In a similar vein, Halliday et al. (2007b) found that easily the most influential part of pre-sentence reports is that which synergizes *both* offence and offender information in one single section to tell a narrative, rather than biographical information which appears to sentencers to be abstracted from offence information.

Although I wish to advocate a more interpretive approach to sentencing as craftwork which escapes the individualized sentencing versus tariff sentencing dichotomy, it is also true that sentencers may understand their identity in part through the idea of balancing an individualized and tariff discourses of justice. Intellectually and in the abstract, these two discourses of justice are mutually contradictory. Yet sentencers appear routinely to rationalize their decisions in these terms, by publicly performing a balancing act between these two discourses, to which we now turn.

CONSISTENCY

Unlike artwork, 'the product of craftwork has the characteristic of consistency' (Kritzer, this issue). I will suggest, however, that sentencing craftwork is *also* about individual craftworkers (most especially judges) inscribing their personal signatures upon the crafted work (the case).

THE TARIFF VERSUS INDIVIDUALIZED JUSTICE BINARY

Both the new penology and legal-rational tradition have relied on a binary in sentencing decision process which counterposes individualized sentencing against tariff-based consistency. For example, mainly on the basis of evidence of the operation of US numerical guidelines, Franko Aas (2005) presents a shift in sentencing towards automation, homogenization and a spurious consistency, and away from a concern with individualized justice. Indeed, the new penology has been concerned to present a shift from welfare (associated with individualized justice) to risk (associated with categories of people and a supposed loss of discretion). However, research suggests that this risk-welfare dichotomy is rather too simple and that 'risk' and 'welfare' are rather more dynamic and synergistic than has been hitherto portrayed by the new penology (e.g. Kemshall and Maguire, 2001; Robinson, 2002; Marutto and Hannah-Moffat, 2006; Halliday et al., 2007a).

While the new penology tends to find tariff-based sentencing less humane (and worse) than individualization, the reverse has tended to be true for legal-rational tradition. In the legal-rational tradition, the dangers of individualized justice drive the search for the holy grail of 'true' consistency.

THE PERFORMANCE OF BALANCE BETWEEN INDIVIDUALIZED AND TARIFF SENTENCING

While Kritzer (this issue) suggests that 'the product of craftwork has the characteristic of consistency', it is also and simultaneously about individualization and treating cases as unique (Flemming et al., 1992). Craft suggests both a pursuit of consistency *and* leaving the craftworker's personal mark to signify the piece of work as having been treated as uniquely individual, and dealt with by a unique individual craftworker (leaving, in effect, a personal signature).

One aspect of sentencing judgecraft is the performance of 'balance' between two discourses of justice: tariff-based consistency and individualized justice. Neither are representative of 'the essence' of sentencing and neither are possible in a pure form (they are 'ideal types'), but the performance of sentencing craft is about the performance of balance of these two idioms. For example, in the use of the Scottish sentencing information system, judges appear to find satisfying the ability to flick between an aggregate representation of justice (tables and graphs) and an individualized vision (text) (Hutton

and Tata, 2000). This may be a way of underlining that sentencing craftwork is at the same time *both* individualized *and* tariff-rule-based.

THE USES OF INCONSISTENCY AND SURREPTITIOUS CREATIVITY

While supposed disparity may sometimes be an artefact of conceiving of sentencing through fixed and immutable binary epistemologies, there are also instances where inconsistency (reputed or real) is deliberately traded upon by judges to help to facilitate desired outcomes. One example of this is the very strong awareness of ‘judge shopping’. For example,

Interviewer: And I noticed that you also said that he would be coming before yourself.

Sheriff: Yes.

Interviewer: Rather than another sheriff.

Sheriff: Yes.

Interviewer: Is there a reason for doing that or is it . . .

Sheriff: The reason for doing that is that I suppose in a sense because there are so many different sheriffs with so many different approaches to cases, and some sheriffs are harder than others. And that’s inevitable because you’re dealing with human beings. Perhaps I have a certain reputation for being quite hard or quite strict, I don’t know. (Tata et al., 2006: 20)

Likewise, in order to juggle their workloads successfully, defence solicitors sometimes deliberately rely on some of their clients failing to appear because of the reputation of the judge they are told they will appear before that day (Tata and Stephen, 2006). In this way, sentencing disparity (whether real or imagined) is felt to be functionally useful and is institutionalized.

Judges may also deliberately seek to flout consistency (and the authority of the Court of Criminal Appeal) by developing their own personal individual sentencing policies. For example, ‘Well, for 13 years I’ve had my fist on the bench and said – I’m just not having this! And I mean they now know. First offender, doesn’t matter: you will go to prison for [offence]. Now that’s public policy’ (Sheriff Court judge interview, Tata et al., 2006).

In other instances, the use of inconsistency (disparity) and deliberate avoidance of rules may be more surreptitious. Here a sheriff explains that s/he sees a custodial sentence as ‘the best detox available in [the area]’, and so was concerned to apply sentencing powers creatively (and in contradiction to Appeal Court guidance) in multiple conviction cases:

I’m happy to tell you on tape that I’m not meant to work out net sentencing – I’m meant to sentence gross, as you probably know – but I did do a wee check [laugh] just to see that he was going to do another 10 days in passing, cos I wanted him to finish his detox. (Interview, Sheriff Court judge, Tata et al., 2006)

While judge shopping and consequent failures of defendants to appear are iniquitous and inefficient to the *system as a whole*, they are also seen as an instrument tool of *individual* efficiency by court practitioners. Thus inter-judge inconsistency is perpetuated by the craft of individual practitioners. In this way inconsistency is institutionalized, even celebrated. For example, in defending an element of disparity, lawyers and judges sometimes remark that a certain amount of disparity presents unpredictability to defendants, thus keeping them on their toes (Tata, 2007). Thus, inconsistency (and reputations of inconsistency) cannot mainly or simply be explained by different individual judges having different penal attitudes and philosophies or ‘happenstance’ (von Hirsch, 1987: 4), nor by a lack of knowledge of where sentencers ‘sit in relation to their brethren’ (Tata and Hutton, 2003: 67), nor by differences in court cultures. Inconsistency is *also* functionally useful to the work of *individual* court actors.⁸ Attempts to reduce disparity in sentencing will have to address the way in which it lubricates the scope of action for court regulars. Systemically the consequence of disparity is to undermine: legal equality, transparency, and the ability of defendants to determine whether and when to plead guilty. Not least because of these effects, inconsistency is regarded by court professionals as an essential resource to make the system work.

A further significant way in which inconsistency is invoked by professionals and regarded as useful is in the legitimization of the sentencing process. A belief in the prevalence of disparity helps to persuade convicted persons to plead guilty at time convenient to professionals (Tata, 2007), and to ‘close’ the case (by refraining from saying anything to the court or pre-sentence report writers which may be incompatible with the guilty plea). A belief in the prevalence of disparity provides a central resource in persuading defendants to believe they will receive (and have received) an unusually lenient sentence or a generous discount in recognition of pleading guilty, and thus helps to maintain relative client satisfaction (Tata, 2007). This will be taken up briefly in the next section.

ACHIEVING CLIENTELE SATISFACTION (UTILITY AND INTERNAL AESTHETIC)

Kritzler (this issue) suggests that (unlike artwork), in craftwork

there is an identifiable customer or clientele. The work is done on behalf of the customer or clientele. Craftwork is typically done to two levels of specification. One level is set by the customer or client; the other level is set by the norms of the craft. The client may recognize the absence of some aspects of the internal norms but will probably miss the most subtle aspects of it.

Kritzler’s description suggests that in sentencing craftwork there might be two levels of clientele audience: an external and an internal one. In sentencing, the external clientele includes the convicted person, victim, media, and so on, while the internal audience (other court professionals) is that concerned with

inter- and intra-professional work norms (e.g. Flemming et al., 1992). The internal audience members are the ones who enjoy the in-jokes, the 'white lies' told to outsiders and recognize the displays of faux emotion referred to earlier. This concept of clientele can be applied to a conception of account giving as socially produced. Rather than seeing reasons as a true explanation of the decision process, we might instead understand reason giving as a central element of judgcraft: reasons are necessarily purposive (Tata, 2002). Reasons do not need to be 'true' but justifiable and capable of satisfying multiple clientele audiences, each of whom have different, and sometimes contradictory, concerns.

THE 'APPARENT' VERSUS 'REAL' REASONS BINARY

In the study of discretionary decision processes (not least in sentencing), there has been a long quest to uncover the 'real' reason behind decision making. Much of the literature exposes the contradictory, bland and incoherent character of publicly given reasons by decision makers. It is widely believed that such reasons fail to reveal the true character of the decision process. Indeed, the empirical discretion literature has tended to talk of reasons as 'post-hoc justification' or 'rationalization', implying a distinction between rhetoric and reality. However, from the perspective of achieving clientele satisfaction in craftwork, this distinction between rhetoric and reality can be revised.

A key part of reason-giving craftwork is to satisfy a multiplicity of conflicting expectations and audiences. This may help to explain further why sentencing reasons seem contradictory and 'incoherent'. Rational explanation is one requirement of reason giving but so are legitimation and clientele satisfaction. I do not mean to suggest here that written judgments are duplicitous but simply that sentencing reason giving is necessarily purposive.⁹ Reasons are not provided as a simple report of the consciousness of thought. Rather, reasons are ever-purposive accounts conscious of audience, interpretation, culture and power (Tata, 2002). Writing about the media as an integral part of criminal justice, Ericson (1995) explains that the formal obligation to give an account 'varies, for example, by what has to be accounted for; who makes the demand ... who is the intended audience ... and the spatial, social, cultural and communications format capacities to make an account' (p. 137). There is no unmediated account of judging waiting to be found. We cannot observe the thinking of others (e.g. sentencers) in the absence of language and expression (Wittgenstein, 1958/2001; Shulte, 1992). Although much empirical research (including my own) has searched to try to achieve it, we cannot look inside their heads to find the 'true' rationale of their decision as opposed to a mere presentation of it. Thought cannot be observed separately from expression. Thus, the attempt to search for the authentic reality of decision making as opposed to 'mere' accounts of it is futile.

THE CRAFT OF ACHIEVING CLIENTELE SATISFACTION

Moreover, part of judgecraft is in achieving satisfaction among clientele: 'There is a large and growing literature that considers procedural justice as influencing litigants' assessments of their treatment in court or similar settings . . . and arguably much of the assessment will deal with how parties feel they have been treated by the judge' (Kritzer, this issue). How, then, does the sentencing process achieve the relative satisfaction of convicted persons?¹⁰ One way is by invoking reputations of inconsistency (see above). Not only are the clients' expectations shaped by the defence solicitor but other professionals can help to seal the message: 'you're lucky to have got off so lightly'. Where judges and pre-sentence report writers affirm the defence lawyer's advice to the client, it is regarded as a particularly powerful unified message to manage the client. For example,

On many occasions when [the judge is] giving them liberty as an alternative to incarceration [she or he] asks, 'Are you aware of that?' And if your client can see at that stage something which is indicative of the pains of the court being visited upon him, albeit he's getting his liberty, then you're hitting your target. So the client is very aware: 'I'm in real trouble here and I totally appreciate if I slip up once, I've even spoken to my lawyer, I'm going to jail for three years.' And the sheriff says, 'You're absolutely dead right!' (Interview with defence solicitor, Tata et al., 2006: 18)

In their ability to mollify conflicting audiences, to be read at a number of different levels and to hold at bay a variety of potentially critical voices, might there be believed to be by internal clientele audiences 'an internal aesthetic' (Kritzer, this issue) (or what Becker (1978: 865) describes as 'virtuoso skill') in sentencing judgecraft?

CONCLUSION

This article has aimed to reveal that although they disagree strongly with each other about many normative points, the two most used frameworks for understanding sentencing practice share a series of key binary assumptions. Both the legal-rational tradition and the new penology are inspired by evidence of change at the level of official and media discourse. While that discourse is very important, heavy reliance on it leads to a top-down view of change and tends to neglect the agency of penal workers. Conceiving of sentencing as craftwork helps us to try to understand from within the perspective of sentencing craftworkers the apparent contradictions of sentencing work which may seem perverse from the outside: 'a way of seeking to appreciate the pressures of just doing the job . . . trying to explain social processes that are outrageous from the researcher's perspective' (Cowan and Hitchings, this issue).

Thinking of sentencing as craftwork also facilitates an understanding of the sentencing process which is not overwhelmingly focused on the judge as the decision maker, but rather as part of a sequence in a decision process, where the judge is a member (albeit the most central) of a collaborative sentencing world. Consequently, craftwork focuses our attention on sentencing as a social process, rather than simply as an individual judicial exercise chiefly based on the application of principles to case facts. Furthermore, craftwork disturbs the taken-for-granted assumption that sentencing (and other discretionary decision making) are best explained by resort to a cognitive-analytical factorial approach. This is not to suggest that quantitative methods should be avoided, but to ask what other approaches we might adopt to characterize and quantify cases (e.g. 'typified whole-case stories'). Craftwork also suggests that disparity in sentencing practices is not simply produced by accident, ignorance, or culture but is actively perpetuated and celebrated by professionals engaged in the sentencing process. Craftwork also focuses our attention on the dynamics of reason giving as inescapably purposive. This may ultimately lead us to relinquish the quest for concealed 'true' or 'real' reasons for decision making and to study sentencing talk and expression in all their varied forms and contexts.

Both the legal-rational tradition and new penology operate their characterizations of sentencing practice on the basis of binary oppositional distinctions: rules versus discretion; reason versus emotion; normative penal principles versus non-rationality; aggravation versus mitigation; offence versus offender; individualized punishment versus the tariff; apparent reasons versus real reasons. By conceiving of sentencing practice as craftwork, these binary distinctions are shown to be fundamentally contingent, protean, mutually inhabiting, and dynamic. In the daily routine of sentencing craft these binaries may dissolve and become mutually indistinguishable and yet appear again elsewhere.

This is not to say, however, that these binaries are no more than empty rhetoric concealing the 'true' nature of sentencing. Rather these categories are useful to sentencing professionals (by which I mean not only judges but others involved in the sentencing enterprise). These binaries constitute a currency of legitimating reference points. The binaries comprise some of the vital touchstones of legitimation and can be deployed to imply (especially to external audiences) determinacy in decision making, while also offering potential versatility, agility and indeterminacy to professionals. They provide sentencing professionals with a currency of persuasive techniques which can manage external (the defendant, the victim, and other publics) and internal (other court professionals) audiences.

Sentencing professionals can believe in and employ these binary categories one moment and dismiss them the next because they depend on local, temporal, and case contexts and the professionals largely control the definition of 'context'. Thus, in the craft of sentencing talk these binaries can appear at one moment and disappear at the next. These binaries are, in practice, impossible to apprehend and define regardless of context. They operate dynamically,

contingently, and synergistically and have little *empirical* essence to which they can be reduced. Sentencing scholarship has largely been preoccupied with the attempt to apprehend the empirical essence of these binary categories, to comprehend and measure them as fixed, universal, non-contingent, discrete entities regardless of time or context. A sociology of sentencing craftwork invites us to ask whether that endeavour to apprehend, capture, and fix the essence of these binaries as empirical categories may be unrealizable.

NOTES

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1. Although there is now a rich literature in the sociology of punishment (especially penal change at the level of policy and rhetoric), there has been very little work which seeks to develop a sociology of the day-to-day allocation of punishment (sentencing).
2. For example, in seeking to demonstrate awareness that concentration on official discourse does not necessarily change practice as intended, Garland (2001) also reveals a (slightly restrained) top-down view of change:

A new configuration does not *fully and finally* emerge *until* it is formed in the minds and habits of those who work in the system. *Until* these personnel have a settled *habitus* appropriate to the field, enabling them to cope with its demands and *reproduce it* 'as a matter of course', the process of change remains *partial and incomplete*. (p. 24, emphasis added except 'habitus')

While the point that top-down change cannot be assumed to be 'fully or finally' complete, it is nevertheless assumed to be inevitable that official policy discourse will filter down to ground level in more or less the intended way.

3. One is that it enables distancing so as to render the convicted person more punishable (e.g. Tombs, 2006). It also facilitates a belief in the triviality of the case (including that the convicted person does not care or expects to be punished). These also work together with the need to get through the list (e.g. Flemming et al., 1992; Mack and Roach Anleu, this issue).
4. This binary of 'rules' and 'discretion' is reflective of the dichotomy between 'structure' and 'action' in social theory, which some thinkers argue is an artificial dichotomy (Sewell, 1992). Bourdieu (1977) illustrates the synergistic relationship between the material (the world of objects) and 'mental structures'.
5. That research (ESRC award number RB000239939) has aimed to understand the process of communication between report writers and sentencers in the Sheriff Courts of Scotland. Although it is not intended in this article to provide an overview of that research, a few of the findings are mentioned here to illustrate some of the points made in the wider argument. The aims of the four-year research study were achieved through ethnographic observation of the process of the production of reports (observations of client interviews, the report-writing environment, shadow report writing and post-report writing interviews). And also, by seeking to understand how Sheriffs (professional judges

in Scotland's intermediate criminal courts) read and interpret those reports (including especially those same reports whose production had already been observed) through: pre- and post-sentencing hearing interviews with sheriffs, observation of sentencing hearings, focus groups, moot sentencing hearings of cases observed in the report writing research, pre- and post-interviews, interviews with prosecutors and defence agents.

6. Magistrates were presented with questions about the 'classical purposes of sentencing'. The only attitudinal framework which the study offered subjects was in terms of philosophical principles. From there Hogarth (1971) quickly proceeded to enquire about the correlations between philosophies, their relative weights, and how they are used as cognitive frames through which meaning is constructed by each individual magistrate.
7. Characterizing individual magistrates as deterrent or reformation orientated, Hogarth (1971) concluded that

In summary, the fundamental problems in sentencing arise from the fact that there is lack of agreement as to the social purposes that sentencing should serve . . . In this situation it is not surprising that there is some uncertainty, confusion, and lack of agreement among judges in their approach to sentencing problems which, in turn, leads to disparity in sentencing practice. (p. 6)

8. In saying this I do not wish to be taken to suggest that inconsistency is desirable.
9. Conceiving of the creation of judgments as craft rather than an art encourages us to think about purposes: 'Craft implies practical utility, art does not' (Becker, 1978: 887).
10. Of course, formally it is not for the judge to 'satisfy' the defendant/convicted person. However, it is in the interests of all court actors that cases are closed without 'unnecessary' difficulty: early guilty pleas in particular are a way to this, and (as discussed earlier) it is important that the case 'closes' without the accused being 'in denial' (an 'innocent guilty plea').

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